The Facebook, Inc. v. Connectu, LLC et al
Doc. 252 Att. 4

EXHIBIT 3

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SAVVYSPACE INTERNET DATA CENTER
COLOCATION SERVICE AGREEMENT

THIS AGREEMENT is made between **Savvy Networks, Inc.**, (hereinafter "SavvySpace"), a New York corporation having its main offices at 777 Old Saw Mill Road, Tarrytown, NY 10591, and Thefacebook having its main offices at 249 Kirkland Mail Center Cambridge MA 02138, (hereinafter "Customer").

WHEREAS, Customer desires to obtain from SavvySpace certain connectivity and Colocation services from SavvySpace facilities, and to be integrated into the Network architecture of SavvySpace, the SavvySpace network being a portion of the Internet; and

WHEREAS, SavvySpace is willing and able to provide such services to Customer

THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties agree and intend to be legally bound, as follows:

1. *Definitions*
   The following terms shall have the following meanings for purposes of this agreement.
   1. **Colocation Site** shall mean the location of the POP in which Space for Customer's Equipment, is made available by SavvySpace.
   2. **End User** shall mean any person enabled, through a data connection over the Internet to access, use, purchase, download, or otherwise interact with the content, which is located on or distributed by means of the Equipment.
   3. **Content** shall mean electronic data, software, programs, or information provided by Customer and made available to End Users by means of the Equipment, which may include, but is not limited to, advertisements, product information, database records, publications, articles, announcements, news, software services, electronic exhibitions, games and entertainment of various types.
   4. **Equipment** shall mean computer, networking, and data communications hardware and software (typically including one or more World Wide Web servers) owned, located and maintained by customers in the available Space.
   5. **Network** shall mean the TCP/IP-based data communications network (including all hardware, software, telecommunications facilities and equipment) owned, operated and utilized by SavvySpace, through which End Users may access Customer's Content via the Internet.
   6. **POP** shall mean a Network point-of-presence where the Space for the equipment will be located.
   7. **Space** shall mean the area within a SavvySpace controlled suite, cage, cabinet or rack, provided by SavvySpace and set aside for Customer Equipment in the Colocation Site.

2. *Space Specifics*
   1. **Environment:**
      SavvySpace shall provide environmentally controlled Space within the Colocation Site in which to house the Customer Equipment. SavvySpace will adequately condition the air within the Space by maintaining cooling and dehumidification at accepted industry standard levels.
   2. **Power Requirements:**
      SavvySpace shall provide redundant main feeds of fused and filtered AC power service 24 hours a day, 7 days a week. SavvySpace will be responsible for the payment of ongoing power usage fees to the local power utility. Power outages may be required from time to time as power systems are serviced or upgraded. SavvySpace will inform Customer in advance of any scheduled power outage and the expected duration of the outage. Each room, cabinet or rack shall be backed up by SavvySpace with our central UPS (uninterrupted power supply) and backup power system as part of the monthly service fees.

3. **Room, Cage, Cabinet, Full Rack, Half Rack & Shelf:**
SavvySpace shall provide Space to house Customer Equipment. A "Room" shall comprise the entire space of a locked, hard-walled 10' x 11' room. A "Full Cage" shall comprise the entire space of a locked 10' x 10' wire mesh enclosed area. A "Half Cage" shall comprise the entire space of a locked 5' x 10' wire mesh enclosed area. A "Cabinet" shall comprise the entire space available in one (1) SavvySpace owned lockable freestanding cabinet of the total dimensions 24" W x 36" D x 84" H. A "Full Rack" shall comprise the entire space available in one (1) SavvySpace owned freestanding open rack of the total dimensions 24" W x 81" H. A "Half Rack" shall comprise one-half the entire space of a Full Rack (24" W x 40" H). A "Shelf" is a 24" W x 30" D x 9" H Space on a Full Rack in the Public Rack Area. Customer will specify on the Order Form, the Colocation Space and the Service Level.

4. **Customer Access to Space:**
Customer shall at all times have unobstructed 7x24x365 access to the Space. SavvySpace shall provide unlimited physical access to the Colocation Site for individuals designated and authorized by Customer. The names of those individuals whom Customer initially authorizes will be set forth in a separate security authorization document. SavvySpace shall provide access to the Equipment in the Space on a 24-hour per day; 7-day per week basis, subject to the conditions set forth in this Section.

5. **Landlord Requests:**
Any and all arrangements requiring coordination with the Colocation Site's landlord will be made only through SavvySpace personnel directly. This includes access to the conference rooms, telecommunications center, freight elevators and the loading dock area.

3. *Equipment Specific*

1. **Provisioning:**
Customer, or its subcontractors as Customer shall designate in writing, shall at its own expense supply, order, install, configure, troubleshoot, and maintain all Equipment, including cabling and termination devices necessary to support Network access and console access to the Equipment. At Customer's option and at its own expense, Customer may order one or more analog phone lines from a local telephone company for direct dial remote access to the Equipment, or for dialing out for other reasons. SavvySpace will provide the necessary cross-connect from its phone closet nearest the Colocation Site to the Space. SavvySpace will not provide a telephone line in the Space as a matter of Customer convenience or necessity.
2. **Security:**
SavvySpace shall not allow its personnel, visitors, guests or others on its premises to open, touch, handle or tamper with the Customer Equipment, except under explicit direction of Customer. However, SavvySpace does not guarantee security of the Customer Equipment, Content, Space or Network. SavvySpace requires that the Customer, its employees and contractors comply with all Colocation Security Procedures as published and distributed by SavvySpace, in order to maximize the security of the Network and Space. Customer must establish a password with SavvySpace for purposes of requesting support services, with respect to Customer Equipment or your Network connection either by telephone or email. Information detailing password requirements is available in the SavvySpace Acceptable Use Guidelines. Only individuals you identify in writing to SavvySpace as Customer Representatives will be permitted to enter the Space, request Services on your behalf, or request support services on Customer Equipment or your Network connection, either by telephone or email. With good cause and at its sole discretion, SavvySpace may suspend the right of any Customer Representative or other person to visit the facility and/or the Space. Customer shall be solely responsible for End User access security and Network access security. SavvySpace will reasonably assist in Network security breach detection or identification, but shall not be liable for any inability, failure or mistake in doing so.

3. **Domain Name and Network Number:**
Customer shall arrange for the provision of Domain Name Service for any Equipment it desires to be accessible by hostname to End Users over the Internet, or, at its option, Customer may request that SavvySpace provide Domain Name Service ("DNS") only to the extent necessary to provide such access to the Equipment. Customer may use a domain name or subdomain already registered under its business name, or SavvySpace shall apply for and maintain DNS for one (1) new domain name per Colocation Site for this purpose, at Customers option. Customer shall be solely responsible for the InterNIC registration and maintenance taxes incurred in connection with each new domain name. SavvySpace shall supply to the Customer and route a sufficient number of Classless Inter-Domain Routing (CIDR) host IP addresses from its block of addresses to support Network access to the Equipment. CIDR IP addresses are and shall remain the sole and exclusive property of SavvySpace and shall immediately be relinquished by Customer at the termination of this Agreement to allow for reassignment and reuse by SavvySpace. SavvySpace shall not supply or route non-CIDR IP addresses under this Agreement .

4. **Customer's Support Personnel:**
SavvySpace is not responsible to Customer for providing, or for any costs or expenses associated with providing any administrative, technical, emergency or support personnel or services necessary for dealing with SavvySpace or for providing and maintaining Customer's Equipment, Content or access to the Network, except as may be noted on Order Form. SavvySpace shall provide one or more email addresses to which Customer's authorized personnel may direct questions, issues or concerns regarding the services provided by SavvySpace under the Agreement.

5. **Equipment Access to Network:**
Each Room, Cage, Cabinet, Full Rack or Half Rack shall have 10/100 Base-T jacks to connect the Equipment to the Network at the access speed purchased by Customer. Except for such Network access and remote console access provided exclusively for operational purposes under Section 3.1, any form of connectivity between the Equipment and any Network or transmission medium other than SavvySpace is prohibited.

6. **Risk of Loss:**
Customer shall at all times before, during and after the term of this Agreement bear the entire risk of loss, damage, theft, or destruction of the Equipment or any part thereof, from any and every cause whatsoever.

7. **Disconnection:**
SavvySpace shall retain the right to disconnect the Equipment from its LAN and/or from the Network at any time, provided that SavvySpace provides at least two (2) hours' advance notice to Customer. Advance notice shall not be required, however, for disconnection due to Customer's breach of Sections 4.2, 5.6, or 9.2, or when any delay in disconnection presents a substantial risk, of service outage, or damage to equipment or data belonging to SavvySpace or to a third party, or damage to the POP or Colocation Site or to any persons or property present therein: provided however, that SavvySpace will give Customer notice via telephone immediately upon disconnection without advance notice. Customer reserves the right to shut down the Equipment at the Colocation Sites in accordance with its emergency operating procedures, with prompt notification to SavvySpace.

8. **Relocation of Equipment:**
Relocation of the Equipment, if required by Customer, shall be performed by Customer or its subcontractors at Customer's expense. SavvySpace is not responsible for Network access disruptions caused by Customer's Equipment relocation requirements.

4. *Customer Use of Space, Equipment Content and Network*
   1. **Ownership of Equipment and Content:**
   Customer intends to support the dissemination and use of its Content by End Users through Network access to the Equipment. All interest in and ownership of the Equipment and the Content including, but not limited to, those portions of the Content that are Customer's trade names, trademarks or service marks, are and shall remain the property of Customer.

   2. **Network Usage Restrictions:**
   Customer warrants that Network access, the Equipment, and the Content will not constitute violations of, or be used to violate, any community or Internet policies, practices, or standards, laws or regulations of local, state or federal governments or agencies thereof, or international treaties. Actions such as, but not limited to, misuse of copyrighted materials, misappropriation of trade and other distinguishing marks, and use of the Network, the Equipment, the Content, or any SavvySpace facilities for defamatory, threatening or obscene purposes are prohibited. Any such violations may be grounds for termination of this Agreement upon receipt of written notice to Customer by SavvySpace specifying such violation.

   3. **No Backup by SavvySpace:**
   SavvySpace shall not provide or guarantee any data back-up or data storage of Customer's Equipment or Content. Customer is solely responsible for providing any data storage, data back-up and archival history with respect to its Equipment and its Content. At Customer's request, direction and additional expense, SavvySpace personnel will exchange back-up tapes within a tape drive located in the Space.

   4. **Responsibility for its End Users:**
   Customer shall be solely responsible for providing customer services, technical support, pricing and service plans, billing and collections, and any and all other services to its End Users, and SavvySpace shall have no obligations whatsoever to End Users under this Agreement.

5. *Charges and Payments*

1. **Setup Charges:**
   SavvySpace will bill, and require full payment from Customer for all Service Setup Charges and first and last month Service Fees (collectively, "Setup Charges") upon SavvySpace's acceptance of this Agreement and accompanying IDC Colocation Order Form. SavvySpace will not start installation, configuration, initiation and Service unless and until it has received payment in full of all Setup Charges.

2. **Recurring Charges:**
   SavvySpace will begin billing for recurring Service Fees on the date that is the earlier of: (a) the Installation Date and (b) the date that Customer places Customer Equipment in SavvySpace Space. If, however, Customer is unable to use the Services commencing on the Installation Date solely as a result of delays caused by SavvySpace, then the Installation Date specified in the Order Form shall be extended one day for each day of delay caused by SavvySpace. Prior to the first day of each month, SavvySpace will bill Customer for Network services to be provided during the coming month, and for Colocation services provided in the current month. SavvySpace Recurring Service Charges do not include monthly telephone company charges, which may be billed separately by the telephone company, when the Customer provisions additional services outside this agreement.

3. **Payment:**
   Customer shall pay monthly service fees to SavvySpace according to the Colocation Service Package specified by Customer on Colocation Order Form. Payments for Internet Charges and Fees are due, in U.S. Dollars, by the first day of each Service month, and are considered late and in default by the tenth day of the Service month.

4. **Customer Charges:**
   Customer is solely responsible for establishing and collecting the charges, if any, for Content and related services it offers to its End Users through the Network and Equipment, and for preparing and mailing invoices to its End Users. Customer remains responsible for payment of the total amounts invoiced it by SavvySpace regardless of whether Customer is paid for Content and related services offered to its End Users.

5. **Taxes:**
   Customer shall be liable for and shall reimburse SavvySpace for all taxes and related charges however designated resulting from the transactions contemplated hereby, including federal, state, provincial or local sales or use taxes and excise taxes, imposed in connection with or arising from the provision of services under this Agreement, except for taxes incurred by SavvySpace on its income.

6. **Late Payments:**
   Payments not received in the SavvySpace billing office by the tenth day of the month may be subject to service interruption and subsequent reconnect fees. The absence or lateness of invoicing does not extend, modify or change the payment terms of this agreement. For Colocation, SMTP mail, FTP, and Web hosting services, the interruption of service alone does not constitute account cancellation. Fees will continue to be charged for each month the client equipment is on SavvySpace' s premises. SavvySpace may discontinue providing Network access to any or all Equipment by Customer and its End Users upon forty-eight (48) hours written notice by overnight courier or certified mail to Customer. SavvySpace shall resume providing Network access to such Equipment immediately upon receipt of such payment. Services interrupted due to lack of payment will be subject to a $500 reconnect fee. In cases where accounts are past due and Services are not interrupted, past-due accounts may incur a $500 per incident late fee. In addition to late or reconnect fees, invoices not paid by their due date shall be subject to a 1.5% per month interest fee, or the maximum interest allowed by applicable laws, whichever is less, on all past-due balances. In the event SavvySpace incurs additional fees as a result of any collection activity, such as collection agencies or legal fees, Customer shall reimburse SavvySpace for all such fees.

6. *Term, Extension & Termination*

1. **Initial Non-Cancelable Term:**
   This agreement shall commence upon installation of services for a period of two years. This Agreement shall extend from the Service Order Date until the end of the initial non-cancelable term, which shall be one (1) year from the last Anniversary Date.

2. **Extension:**
   Unless terminated by either party as provided herein, this Agreement shall automatically renew for successive one-year terms after contract term expiration. Customer shall be invoiced for any subsequent monthly service

fees as set forth above. Service rendered beyond each term will also be subject to the regular monthly service fees adjusted for an annual increase not to exceed 15%.

3. **Termination:**
   1. **By Either Party:**
      1. **For Default:**
         Either party may terminate this agreement for default by the other party for material breach of the Agreement should such breach not be cured within thirty (30) days of written notice clearly specifying the material breach to the other party, provided however that the opportunity to cure shall not apply to Customer's material breach of Section 4.2 of this Agreement.
      2. **End of Term:**
         Either party may terminate this Agreement for any reason upon thirty (30) days written notice before the end of either the initial or any subsequent terms.
   2. **By SavvySpace:**
      1. **For Non-Payment:**
         After thirty (30) days of non-payment from the invoice due date, Network access may be permanently disabled and use of the Space revoked by SavvySpace and/or this Agreement terminated, at the sole discretion of SavvySpace. Disablement or termination of this Agreement for non-payment does not relieve Customer of its responsibilities hereunder, including but not limited to the payment of all fees up to the date of disablement or termination and all monthly service fees remaining to the end of the then-current term, should SavvySpace decide not to terminate the Agreement.
      2. **For Termination of SavvySpace Lease:**
         Should SavvySpace or the landlord of the Colocation Site decide at their sole discretion to terminate the lease of the real property in which the POP and/or Colocation Site is situated, SavvySpace may terminate this Agreement upon thirty (30) days written notice.
      3. **Removal of Equipment:**
         Customer will provide SavvySpace with written notification at least two (2) days before Customer wishes to remove any Customer Equipment. SavvySpace will only authorize the removal of Customer Equipment after the SavvySpace accounting department has verified that Customer has no outstanding payments due to SavvySpace. Once Customer Equipment removal is authorized, Customer will remove Equipment and be responsible for bringing appropriate packing and moving materials. If Customer uses an agent or third party, including but not limited to FedEx, UPS or other common carrier to remove Customer Equipment, Customer will be solely responsible for the acts of such party and any damages caused by such party to Customer Equipment. Customer shall remove all Customer Equipment located in the Space within ten (10) days of the date of termination of this Agreement for any reason. In the event the Equipment is not removed, SavvySpace may remove it and retain possession thereof as security for the payment of any sums owed by the Customer under the Agreement. Customer shall not acquire any interest in, nor file any liens upon, the Space or any portion of the Colocation Site as a result of this Agreement or its termination for any reason.

7. ***Insurance***

Customer shall provide proof of insurance prior to installation of Equipment in the Space and maintain such insurance at all times during the initial and any renewal term of this Agreement and during any ten-day removal period pursuant to Subsection 6.3.2.3 of this Agreement. Proof of insurance shall be provided by delivery of certificate of insurance to SavvySpace showing the following types of insurance, in the following minimum amounts, which insurance shall be issued by companies with a Best's Key Rating of at least A-.

Worker's compensation insurance complying with the laws of the state of New York, regardless of whether Customer is required by such law to maintain worker's compensation insurance, and **employer's liability insurance** with the limit of $100,000 per occurrence:

Occurrence from commercial general liability insurance including coverage for personal injury, bodily injury, death, contractual liability and broad form property damage, including loss of use of property, occurring in the course of or in any way related to Customer's operations, in the amount not less than $1,000,000 combined single limit per occurrence: and

Excess or umbrella liability coverage with a combined single limit of $1,000,000 per occurrence to be excess of (a) and (b). Electronic errors and omissions coverage including coverage for, losses attributable to damage, destruction, and/or fraudulent modification of electronic data.

SavvySpace and its landlord for its Colocation Site shall not insure or be responsible for any loss or damage to property of any kind owned or leased by the Customer or its employees, servants and agents, including but not limited to the Equipment. Any policy of insurance covering the Equipment against loss or physical damage shall provide that underwriters have given their permission to waive their rights of subrogation against SavvySpace, its landlord, and their directors, officers, employees, agents, parents, subsidiaries and affiliates. SavvySpace, except in the case of worker's compensation insurance, shall be named as an additional insured on each of the policies required above, and the certificate of insurance for each policy shall be delivered to SavvySpace upon execution of this Agreement. The certificates shall show that the insurance is prepaid, and in full force and effect and that such insurance shall not be canceled, non-renewed or decreased, during the initial or any renewal term of this Agreement or during any ten-day removal period pursuant to Subsection 6.3.2.3 of this Agreement, without at least thirty (30) days written notice to SavvySpace. The maintenance of insurance by Customer shall not affect or limit the extent of Customer's liability under this Agreement. If SavvySpace's landlord in the Colocation Site in which Customer maintains Equipment has other insurance requirements under its lease, Customer hereby agrees to comply with the landlord's requirements in addition to the requirements under this Agreement.

8. ***Service Adjustments***
SavvySpace warrants that it will use its commercially reasonable efforts to minimize and avoid downtime for 99.9% of the hours as an average calculated over each calendar year. If Network access to the Customer's Equipment is disrupted due to a failure of SavvySpace's equipment or circuits at the POP within which the Colocation Site is situated, except for occurrences due to force majeure as set forth in Section 13.2 hereof, then the following adjustments will be made:
If Customer is unable to transmit and receive information from the Network to other portions of the Internet because SavvySpace failed to provide Network access Services for more than four (4) continuous hours during a calendar day, SavvySpace will credit the Customer account for one (1) day's worth of bandwidth. Only one additional service day can be granted per calendar day or portion thereof. The foregoing represents the sole remedy available to Customer for Network access disruptions. Customer must notify SavvySpace within three (3) business days from the time Customer becomes eligible to receive a credit under this Section 8 to receive such credit. Failure to comply with this requirement will forfeit Customer's right to receive any credit due.

9. ***Confidential Information***
    1. **Acknowledgment of Confidentiality:**
    Each Party hereby acknowledges that it may be exposed to confidential and proprietary information belonging to the other party or relating to its affairs. Such materials shall be expressly designated or marked as confidential. Confidential Information does not include (i) information already known or independently developed by the recipient: (ii) information in the public domain through no wrongful act of the recipient, or (iii) intimation received by recipient from a third party who was free to disclose it.

    2. **Covenant Not to Disclose:**
    Each party hereby agrees that it shall not use, commercialize or disclose the other party's Confidential Information to any person or entity, except to its own employees or agents having a "need to know" such information in connection with the performance of this Agreement, and to such other recipients as the Other party may approve in a signed, written document. Neither party shall alter or remove from any software, documentation or other Confidential Information of the other party (or any third party) any proprietary, copyright, trademarks or trade secret legend. The parties' obligations of confidentiality under this Agreement shall survive termination of this Agreement for any reason.

10. ***Indemnification of SavvySpace***
CUSTOMER AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS SAVVYSPACE AND ITS PARENTS, SUBSIDIARIES, DIRECTORS, EMPLOYEES, AGENTS AND SUBCONTRACTORS AGAINST ANY AND ALL ALLEGATIONS, CLAIMS, EXPENSES (INCLUDING REASONABLE ATTORNEY'S FEES AND DISBURSEMENTS), LIABILITY OR SUITS THREATENED, MADE OR BROUGHT IN RELATION TO OR ARISING FROM (i) CUSTOMER'S DESIGN, CREATION, PROVISION, DISTRIBUTION OR USE OF INFORMATION AND TECHNOLOGIES IN THEIR CONTENT, INCLUDING, BUT NOT LIMITED TO, ANY RELATED COPYRIGHTS, TRADE SECRETS, TRADE NAMES, PATENTS, OR OTHER INTELLECTUAL PROPERTY RIGHTS, OR (ii) CUSTOMER'S OR ITS END USERS VIOLATION OR ALLEGED VIOLATION OF LAWS PROHIBITING OBSCENITY, DEFAMATION, HARASSMENT, OR ANY OTHER LAWS, RULES, REGULATIONS, INTERNET OR OTHER COMMUNITY POLICIES, PRACTICES, OR STANDARDS, OR INTERNATIONAL TREATIES IN EFFECT IN ANY COUNTRY OR JURISDICTION IN WHICH THE CONTENT CAN BE VIEWED OR RETRIEVED: OR (iii) ANY OTHER ACTS OR OMISSIONS OF CUSTOMER AND/OR ITS END USERS THAT RESULT, DIRECTLY OR INDIRECTLY, IN CLAIMS OR LOSSES ATTRIBUTABLE TO SERVICE OUTAGES INCURRED BY SAVVYSPACE OR SAVVYSPACE'S CUSTOMERS, OR DAMAGES TO EQUIPMENT OR DATA BELONGING TO SAVVYSPACE OR TO OTHER CUSTOMERS OF SAVVYSPACE OR, DAMAGES TO THE POP OR COLOCATION SITE OR TO ANY PERSONS OR PROPERTY PRESENT THEREIN.

11. ***Warranties Excluded***
SAVVYSPACE MAKES NO WARRANTIES IN CONNECTION WITH ITS NETWORK OR THE PROVISION OF ACCESS OR SPACE AS CONTEMPLATED HEREIN, WHETHER WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE OR USE. CUSTOMER HEREBY WAIVES ANY CLAIM (INCLUDING ANY CLAIM BASED ON STRICT OR ABSOLUTE LIABILITY IN TORT) THAT IT MAY HAVE AGAINST SAVVYSPACE FOR ANY LOSS, DAMAGE (INCLUDING LOSS OF PROFITS, LOSS OF DATA OR SPECIAL, INCIDENTAL, PUNITIVE, RELIANCE OR CONSEQUENTIAL DAMAGE) OR EXPENSE CAUSED BY CUSTOMER'S USE OF THE NETWORK, THE SPACE OR THE EQUIPMENT (EVEN IF SAVVYSPACE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES). CUSTOMER ACKNOWLEDGES THAT SAVVYSPACE DID NOT SELECT, MANUFACTURE OR DISTRIBUTE THE EQUIPMENT OR ITS CONTENTS AND THAT CUSTOMER HAS MADE THE SELECTION OF THE EQUIPMENT AND ITS CONTENTS BASED SOLELY UPON ITS OWN JUDGMENT AND EXPRESSLY DISCLAIMS ANY RELIANCE ON STATEMENTS MADE BY SAVVYSPACE OR ITS AGENTS.

12. ***Limitation of Liability***
NOTWITHSTANDING ANYTHING CONTAINED IN THIS AGREEMENT TO THE CONTRARY, THE PARTIES AGREE THAT SAVVYSPACE, ITS PARENTS, SUBSIDIARIES, DIRECTORS, EMPLOYEES, AGENTS AND SUBCONTRACTORS, SHALL IN NO EVENT BE LIABLE TO CUSTOMER OR ANY OTHER PERSON FOR ANY ACTUAL, DIRECT, INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, RELIANCE, PUNITIVE OR ANY OTHER DAMAGES, OR FOR ANY LOST PROFITS OF ANY KIND OR NATURE WHATSOEVER, REGARDLESS OF THE FORESEEABILITY THEREOF, ARISING OUT OF THE PROVISION OF ACCESS OR IN ANY WAY ARISING OUT OF THIS AGREEMENT, WHETHER IN AN ACTION ARISING OUT OF BREACH OF CONTRACT, BREACH OF WARRANTY, DELAY, NEGLIGENCE, STRICT TORT LIABILITY, PATENT OR INTELLECTUAL PROPERTY MATTERS OR ANY OTHER LEGAL OR EQUITABLE THEORY. NO ACTION OR PROCEEDING AGAINST SAVVYSPACE MAY BE COMMENCED MORE THAN TWO YEARS AFTER THE EVENT GIVING RISE TO SUCH CLAIM. THIS CLAUSE SHALL SURVIVE FAILURE OF AN EXCLUSIVE REMEDY.

13. *General Terms*
   1. **Notices:**
   Any notice required or permitted hereunder shall be in writing and shall be delivered personally, deposited with an overnight courier, sent by registered or certified mail, return receipt requested, postage prepaid, in each case to the address of the receiving party first indicated above, or at such other address as either party may provide to the other by written notice. Such notice will be deemed to have been given as of the date it is delivered, or five (5) days after mailed or sent, whichever is earlier.

   2. **Force Majeure:**
   Except for obligations requiring the payment of money, neither party shall be liable for any failure or delay in performance hereunder due to causes beyond its reasonable control, including acts of war, acts of God, earthquake, flood, embargo, riot, sabotage, labor shortages or disputes, governmental acts or failure of the Internet: provided, that such party shall gives prompt notice to the other party of any actual or anticipated delay, shall take reasonable commercial steps to minimize any such delay and overcome its effects, and shall promptly resume performance when the cause of such delay is removed.

   3. **Independent Contractors:**
   This Agreement shall not be construed as constituting either party as a partner or agent of the other party or to create a joint venture or any other form of legal association that would impose liability on one party for the act or failure to act of the other party or as providing either party with the right, power or authority to create any duty or obligation on behalf of the other party, without the other's prior written consent, except as otherwise expressly provided herein.

   4. **Assignment:**
   Neither party may sell, transfer, or assign this Agreement, except to entities completely controlling or controlled by that party, or to entities acquiring all or substantially all of its assets, without the prior written consent of the other which consent shall not be unreasonably withheld or delayed. Any act in degradation of the foregoing shall be null and void, provided, however, that any such assignment shall not relieve the assigning party of its obligations hereunder.

   5. **No Lease:**
   This agreement is an agreement for Services and is not intended to and does not constitute a lease of any real or personal property. In particular, Customer acknowledges and agrees that Customer has not been granted any real property interest in the Colocation Space or other SavvySpace premises, and Customer has no rights as a tenant or otherwise under any real property or landlord/tenant laws, regulations or ordinances.

6. **Marketing:**
Customer agrees that SavvySpace may refer to Customer by trade name and trademark, and may briefly describe Customer's Business in SavvySpace marketing materials and web site. Customer hereby grants SavvySpace a limited license to use any Customer trade names and trademarks solely in connection with rights granted to SavvySpace pursuant to this section 13.6. All goodwill associated with Customer's trade name and trademarks will inure solely to the Customer. Customer may display the slogan "Powered by SavvySpace" together with the SavvySpace logo, or any other SavvySpace trademark, service mark or logo, on Customer's web sites or marketing literature only after obtaining SavvySpace's written approval on a case-by-case basis, and provided Customer abide by the SavvySpace trademark guidelines and such other guidelines as SavvySpace may provide Customer. All goodwill associated with SavvySpace's trade name, trademarks, slogans and logos will inure solely to SavvySpace.

7. **Non-Solicitation:**
It is mutually agreed by both parties that they will not, and will ensure that their affiliates, subsidiaries and contractors will not, directly or indirectly, solicit or attempt to solicit for employment any persons employed by either party during the period that this Agreement is in effect.

8. **Waivers:**
The waiver or failure of either party to exercise in any respect any right provided for in this Agreement shall not be deemed a waiver of any further right under this Agreement.

9. **Changes Prior to Execution:**
Customer represents and warrants that it made no changes to this Agreement prior to providing this Agreement to SavvySpace for its acceptance and execution, and that SavvySpace alone incorporated any and all changes negotiated between, and accepted by, Customer and SavvySpace into this Agreement or into an addendum executed by both parties.

10. **Entire Agreement:**
This Agreement, together with the Order Form and SavvySpace Acceptable Use Guidelines referred to in this Agreement represents the complete agreement and understanding of the parties with respect to the subject matter herein, and supercedes any other agreement or understanding, written or oral. This Agreement may be modified only through a written instrument signed by both parties. The parties shall attempt to resolve any disputes between them, and recognize litigation as an act of last resort. Customer agrees that any action or proceeding arising from a dispute relating to the terms, interpretation or performance of this Agreement, will be filed in Westchester County, New York and be subject to the Laws of the State of New York. Should any terms of this Agreement be declared void or unenforceable by any arbitrator or court of competent jurisdiction, such terms will be amended to achieve as nearly as possible the same economic effect as the original terms and the remainder of this Agreement will remain in full force and effect. If a conflict arises between Customer's purchase order terms and this Agreement, the terms of this Agreement shall take precedence.

Our Spam Policy:

(1) **Savvy Networks reserves the right to charge $500 per complaint to investigate each incident.** (2) Savvy Networks will not deal with your customers or their customers or anyone else. If you are our Customer, we expect you to deal with spam from or advertising for sections of your network. (3) If we get a first complaint, forward it on to you, and don't receive a response indicating the complete resolution of the complaint within 24 hours, we may black hole the IP address range involved in the spam complaint until we are convinced that the problem is resolved. In particular, we are concerned with spam that not only originates from your network, but also that advertises sites hosted on your network. (4) **If we get repeat complaints and it is clear that the problem has not been resolved, we may black hole the section of IP space involved in the spam complaint until we are convinced that the problem is resolved.** If so, we will contact you as soon as is feasible. (5) We reserve the right, per our contract with you, to black hole the section of IP space involved in spam or Denial-of-Service complaints if it is clear that the offending activity is causing great harm to parties on the Internet. In particular, if open relays are on your network or a customer's network, or if denial of service attacks are originating from your network. In certain rare cases, we may have to do this before attempting to contact you. If we do this, we will contact you as soon as is feasible.

THE PARTIES BELOW REPRESENT AND WARRANT THAT THEY HAVE FULL CORPORATE POWER AND AUTHORITY TO EXECUTE AND DELIVER THIS AGREEMENT AND TO PERFORM THEIR OBLIGATIONS HEREUNDER, AND THAT THE PERSON WHOSE SIGNATURE APPEARS BELOW IS DULY AUTHORIZED TO ENTER INTO THIS AGREEMENT ON BEHALF OF THE PARTY WHOM THEY REPRESENT. IN WITNESS WHEREOF, THE PARTIES HAVE ENTERED INTO THIS AGREEMENT AS OF THE DATE SET FORTH:

Print Name Of Authorized Representative:________________________

Signature: x [signature] Date: __________

Title: ________________________

Authorized Savvy Representative: Arthur Cerrati

Signature: [signature] Date: March 24, 2004

Title: Sr. Vice President Sales